



No. 89-376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION, PETITIONER,

v.

GLORIA TREVINO, ET AL., RESPONDENTS,

On Petition For a Writ of Certiorari to the
United States Court Of Appeals For The Fifth Circuit

**BRIEF *AMICUS CURIAE* OF
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF THE PETITION**

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC" or "Advisory Council") is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983.¹ Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

Member companies of PLAC, as well as other products manufacturers throughout the nation, often enter into contracts with the United States government in order to supply products used by the military. Some members manufacture parts and components to be incorporated in complex military products.

1. The members of PLAC are listed in the Appendix.

These companies, of course, are directly affected by the potential for still another form of expansive and open-ended products liability.

PRELIMINARY STATEMENT

Amicus adopts Petitioner General Dynamics' Statement of the Case. However, it is important to identify certain features in the record and the proceedings which underscore the policy considerations addressed by *Amicus* PLAC in this brief. In particular, the views of the United States in the *Trevino* litigation are relevant.

1. The *Trevino* claims were tried during the period October 21-24, 1985. The conversion work on the submarine GRAYBACK occurred during the period 1966-1968. The fatal accident occurred in January 1982.
2. Following trial, the plaintiffs were awarded a total of \$4.25 million in damages by the district court against General Dynamics. *Petition*, at 4.
3. The two contracts awarded by the Navy to General Dynamics for the conversion work on GRAYBACK were plaintiffs' trial exhibits 1 and 2. The contract prices for each respectively were \$561,565 and \$354,895 for a total of \$916,460. (A third contract in the amount of \$589,208 did not appear relevant to the work performed in connection with the GRAYBACK. See U.S. Post-Trial Brief, at 1-2).
4. Plaintiffs' claims against the defendant United States were dismissed by the trial court on October 23, 1985. At the trial court's request, the United States filed a "Post-Trial Brief" addressing, *inter alia*, the "public policy considerations relating to this action." In its post-trial brief, the United States stated:

"There can be no question, however, that whatever General Dynamics' degree of participation in the design decisions which led to the construction and installation of the

chamber on GRAYBACK, *the basic design for such a chamber was the Navy's.*" Post-Trial Brief of Defendant/Cross-Defendant United States, p. 9 (Nov. 25, 1985) [emphasis supplied].

5. The United States urged that the "evidence adduced at trial" indicated that the contractor's "*only involvement with the design*" was to assist Naval Shipyard design personnel "*to produce the working drawings* for the chamber to be built by the government at Mare Island." U.S. Post-Trial Brief, at 9. The "*specifications* from which the working drawings were produced *originated with the Navy.*" *Id.* at 9 [emphasis supplied]. It was "*the responsibility of Mare Island Naval Shipyard to check and approve each drawing* before it was issued to the shipyard production shops for work on GRAYBACK." *Id.* at 9-10 [emphasis supplied].

6. According to the United States, "as a matter of fact . . . as well as a matter of contract *the responsibility for the design work* performed by General Dynamics for the GRAYBACK conversion *was that of the Navy.*" U.S. Post-Trial Brief, at 10 [emphasis supplied].

7. According to the United States, "*the specifications*, the circular of requirements (COR) under which General Dynamics undertook to assist the Navy in the design of the lock-out/lock-in chamber for GRAYBACK, *were established by the government and were not subject to negotiation.*" U.S. Post-Trial Brief, at 14 [emphasis supplied]. The contractor "merely assisted in completing a design *subject to government approval.*" *Id.* at 14 [emphasis supplied]. The United States viewed the argument that the contractor exercised some independent judgment in assisting with the design as "the type of 'continuous back and forth' discussion between the contractor and the Navy, with the Navy making all final decisions," as required by then-existing case law on the government-contractor defense. *Id.* at 14 (citing *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), cert. denied, 474 U.S. 821 (1985)).

8. According to the United States, the evidence showed that "the circular of requirements prepared by the Navy provided a reasonably precise formulation of the chamber to be built on the GRAYBACK," from which neither the Naval Shipyard nor the contractor had discretion to deviate, but as to which both could "suggest modifications" in the process of producing the working drawings. U.S. Post-Trial Brief, at 16. The contractor's "product," the working drawings, was not produced independently of the Navy in response to specifications, but "*was produced under Navy supervision and was subject to Navy approval.*" *Id.* at 19 [emphasis supplied]. "The concept, original specifications, design, implementation, training, maintenance, and method of use were all originated and/or approved by the Navy." *Id.* at 20.

9. In the appeal to the Fifth Circuit, the United States asserted the trial court's error in placing improper conditions on the sort of government "approval" that can trigger the government contractor defense, in effect, engaging in "judicial second-guessing of military decisions" that the defense was meant to avoid. Brief for Appellee The United States in U.S. Court of Appeals, at 18, 40-46 (May 1987).

10. Following the decision of this Court in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), the United States submitted a letter brief to the Fifth Circuit, pursuant to that court's request, asserting that *Boyle* "fully supports the position we have taken previously in this case, and requires a reversal of the district court's rejection of the defense as applicable here . . ." Letter Brief of Appellee United States to Fifth Circuit, at 1 (Aug. 15, 1988). The government stated:

"[T]he Navy's decisions as to how thoroughly to review any design aspects that were developed by General Dynamics, and its decisions regarding how much expertise to bring to bear on this exercise, were part and parcel of its plainly discretionary decision to approve the final specifications. Accordingly, a rule designed to protect the federal

interest embodied in the 'discretionary function' exemption (*Boyle*, 108 S. Ct. at 2518) must be based simply on the fact of the government's approval of precise specifications, without intrusion into the character or details of that approval. Since there is no serious question in this case that the Navy indeed approved the final plans (see Brief of Defendant-Appellant General Dynamics Corp., filed March 26, 1987, at 12-14), General Dynamics has met this element of the *Boyle* test." U.S. Letter Brief, *Id.* at 7-8.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's *Trevino* decision conflicts with the letter and spirit of the contractor defense approved by this Court in *Boyle* and also conflicts with the position of the United States throughout the litigation. However, its inherent weakness goes far beyond that. *Trevino* is based upon vague and amorphous legal guidelines which, when parsed and reviewed, offer the trial bench and bar no clarity in application. On the contrary, instead of protecting "uniquely federal interests," *Trevino*'s legal criteria would promote a quagmire that literally invites pretrial discovery and litigation, pursuant to state tort rules, as to nonjusticiable issues such as highly polycentric military decision-making and the level of "knowledge," "qualifications," "competence" and thought processes of federal officers charged with "approving" military equipment designs. In addition, the *Trevino* decision suffers from grave internal inconsistencies that taint the result reached.

TREVINO'S VAGUE LEGAL GUIDELINES CONFLICT WITH BOYLE, ENCOURAGE TORT LITIGATION REGARDING NONJUSTICIALE ISSUES OF MILITARY COMPETENCE AND SUFFER FROM MAJOR INTERNAL INCONSISTENCIES.

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988), this Court approved a limited "military contractor defense" in order to achieve "uniquely federal interests" and

held that “[l]iability for design defects in military equipment cannot be imposed, pursuant to state law,” when the following three conditions are met:

- (1) the United States approved reasonably precise specifications;
- (2) the equipment conformed to those specifications; and
- (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States.

The dissenting Justices in *Boyle* clearly understood that the limited defense formulation was nevertheless “breathtakingly sweeping,” 108 S. Ct. at 2520 (Brennan, J., dissenting), to be applied even “regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the government, however unreasonably dangerous, were ‘reasonably precise.’” *Ibid*

In *Harduvvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), retired Associate Justice Lewis F. Powell, Jr., sitting by designation and writing for the panel, called the *Boyle* ruling a “broad formulation” of the government contractor defense. *Id.* at 1315. The three conditions listed above “ensure that the defense operates to immunize the contractor only where the government has actually participated in discretionary design decisions, either by designing a product itself or approving specifications prepared by the contractor.” *Id.* at 1316.

The underpinning which led this Court in *Boyle* to invoke federal common law in this area of “uniquely federal interest” was the “discretionary function” exception to the Federal Tort Claims Act. *Boyle*, 108 S. Ct. at 2514-1518. Without the defense, the government’s own tort immunity for its discretionary functions would be undermined. Contractors held liable for design features that were the subject of discretionary approval by the government would “predictably pass on the

costs of liability ultimately imposing costs on the government that its immunity was intended to preclude." *Harduvel v. General Dynamics Corp.*, *supra*, 878 F.2d at 1315.

In the military context, the immunity also serves the "further important purpose" of "shielding sensitive military decisions from scrutiny by the judiciary." *Id.* at 1316. Application of ordinary tort law to military design and procurement decisions is "inappropriate" since defense "exigencies" may require incurring "risks beyond those that would be acceptable for ordinary consumer goods." *Ibid.* Moreover, since the government contractor defense is a matter of federal common law, state law should not operate "either to defeat the defense or to expand it improperly" so that the defense "could not be applied with the uniformity that is a key justification for application of federal common law." *Id.* at 1317.

A. *Trevino's Vague and Conflicting Guidelines*

In *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *reh'g denied en banc*, 876 F.2d 1154 (5th Cir. 1989), the Fifth Circuit panel decision has undermined the *Boyle* defense by "effectively rewrit[ing]" this Court's test for contractor design immunity and imposing new, formalistic legal conditions which inevitably must thrust trial courts into scrutiny of the most delicate and sensitive thought processes of government officials charged with weighing polycentric design decisions. See *Trevino*, 876 F.2d at 1155-1157 (Jolly J., dissenting from denial of rehearing *en banc*).

Trevino also eviscerates the legal defense by creating innumerable fact issues upon which government contractor litigation inevitably must mushroom beyond the summary judgment stage. Lack of uniformity and uncertainty are promoted. Here, in part, is how *Trevino* accomplishes these results:

Trevino's legal guidelines say that:

- 1) government "approval under the defense must constitute a discretionary function." 865 F.2d at 1480;
- 2) "case law defin[es] the *notion* of a 'discretionary function'." *Ibid.* [emphasis supplied] It is "a rich case law," involving policy balancing between competing purposes, *Id.* at 1483-1484, and courts have found it "impossible" to define "with precision every contour of the discretionary function exception." *Id.* at 1484;
- 3) discretionary functions are "only those that involve the use of policy judgment." *Id.* at 1480;
- 4) government "approval" of design requires its "substantive review or evaluation." *Ibid.*;
- 5) in a case like *Trevino*, the "trier of fact will determine whether the government has exercised or delegated to the contractor discretion over the product design." *Ibid.*;
- 6) the government exercises its discretion when "it actually chooses a design feature." *Ibid.*;
- 7) "critical design decisions" may not be left to the private contractor. *Ibid.*;
- 8) when contracting out the design of a concept generated by the government, the United States may not require "only that the final design satisfy minimal or general standards established" by it. *Ibid.*;
- 9) exercise of government discretion "does not revert to the government by the mere retention of a right of 'final approval' of a design." *Ibid.*;
- 10) government "approval" of the design must be with a "substantive review or evaluation of the relevant design features." *Ibid.*;
- 11) "a review to determine that the design complies with the general requirements initially established by the government" is insufficient. *Ibid.*;
- 12) "the mere signature of a government employee on the 'approval line' of a contractor's working drawings,

without more, does not establish the government contractor defense." *Ibid.*;

13) although the "trier of fact should not evaluate the wisdom or quality of any government decision" it must "locate the actual exercise of the discretionary function." *Ibid.*;

14) the government contractor may not exercise the "actual discretion over the defective feature of the design." *Ibid.*;

15) approval of "reasonably precise specifications" means that the "discretion over significant details of all critical design choices will be exercised by the government." *Id.* at 1481;

16) the *Boyle* Court's use of the terms "approved" or "considered by a Government officer" [108 S. Ct. at 2518] "is unfortunate." 865 F.2d at 1481 n. 7;

17) "the government's cognizance of the relevant design features must be on a par with that of the government contractor." *Id.* at 1481 n. 7;

18) "At a minimum, the federal officer approving the design must not only sign it but know what is there." *Id.* at 1481 n. 7;

19) the federal officer signing the design approval must "review" or "understand the specifications" or "care whether the contractor deviated from them." *Id.* at 1481;

20) the purpose of the "approval" test "is to deny the defense to a government contractor 'that is ultimately responsible for the design defect.'" *Ibid.*;

21) "If the government has chosen to delegate its design discretion to a private contractor, however, the government does not exercise a discretionary function by merely approving the contractor's work." *Id.* at 1485;

22) "once the government has delegated authority to the private contractor to make important choices, the government does not exercise a discretionary function by merely accepting the contractor's work." *Id.* at 1485;

23) "although the government's decision to delegate its discretion on a matter to a private contractor is itself a discretionary function, that is not the discretion with which the government contractor defense is concerned." *Id.* at 1485 n. 10;

24) "The discretionary function at issue in the government contractor defense is that discretion involved in 'selecti[ng] the appropriate design for military equipment to be used by our armed forces.'" *Id.* at 1485 n. 10;

25) the *Boyle* defense protects government contractors "if discretion over the design feature in question was exercised by the government." If the government "delegates its discretion" to the contractor "and allows the contractor to develop the design," the defense does not apply; "mere acceptance" of the contractor's work does not provide a defense "unless there is approval based on substantive review and evaluation of the contractor's design choices." *Id.* at 1486.

Merely restating the foregoing 25 *Trevino* postulates of a so-called "defense" reveals a daunting hodgepodge of vague, ambiguous and internally inconsistent legal criteria. They raise more questions than they answer. For example, considering the *Trevino* facts, what really is a "discretionary function"? Does a conscious decision by the government over 13 years of use that training skilled submariners to avoid the dangers of a vacuum is a sufficient safety precaution constitute the government's "exercise of discretion"? Is this not a "policy judgment"? Is a review and approval of design drawings by a designated officer appointed for the purpose not a "substantive review or evaluation"? What are "critical design decisions"? Was there not a "substantive review or evaluation of the relevant design features"? Did the government really not exercise "discretion over significant details of all critical design choices"? Which details were not "significant"? Which design choices were not "critical"? Is it impossible here to "locate the actual exercise of the discretionary function"? Were design aspects not "considered" by the government? Was there no government "cognizance of

relevant design features"? Did the approving federal officer "not know what is there"? Or not "understand the specifications"? Did the government not "select" the design at issue?

Trevino's legal "guidelines" offer absolutely no clear, rational guidance by which to apply *Boyle's* contractor defense. Instead, contracting parties such as the United States and its suppliers are provided elusive guidelines that are at odds with the realities of day-to-day, continuous "back-and-forth" operations and decision-making in the laboratories, shops, factories and field where military equipment is designed, built, perfected and used.

Moreover, juries struggling to evaluate factual issues involving submarines, fighter aircraft, helicopters and the like cannot hope to fathom jury instructions fashioned out of *Trevino's* melange of imprecise standards. Further, even trial judges must inevitably become vexed by appellate legal standards that literally invite denials of merited summary judgments because innumerable questions of fact about "discretion" are artificially raised regarding the intelligence, motives, experience and training of government officers. Who will not be able to "second guess" the relative "experience" of a young, recent engineering graduate designated as the Navy's design review officer? Or even the time he spent on the task in light of other assignments? Must all government review officials be on a par with an Albert Einstein or rocket expert Werner von Braun? And who is to say that even these scientific luminaries would be more competent, skilled or safety-conscious about the conversion of a submarine than the officer actually selected for the task? Yet these are the kinds of questions *Trevino* inevitably invites.

Trevino is little more than a decision desperately in search of a rationale. The trial ensued well before the *Boyle* decision. Despite unequivocal pronouncements by the United States about its true pivotal and critical role in the design approval

process [see *Preliminary Statement, supra* at 2-5], the trial judge entered a \$4.25 million judgment against the contractor some 17 years after it had completed its drafting work for the government's conversion of a submarine at a contract price that was but a fraction of the liability imposed. In such a setting and given the *Trevino* panel's amorphous legal guidelines, which contractor in today's liability world would risk open-ended liability of unlimited duration for a modest price? Little wonder that the United States has repeatedly expressed grave concerns in this case over the distortion of fact as well as the policy problems involved in bypassing the contractor defense.

B. Internal Inconsistencies

Trevino's conflict with the letter and spirit of the *Boyle* defense has already been clearly established. *Trevino*, 876 F.2d at 1155-1157 (Jolly J., dissenting from denial of rehearing *en banc*); see also Petition of General Dynamics herein, at 7-19; Brief of *Amicus* Aerospace Industries Association of America, Inc., in support of Petition, at 2-9. We will not repeat the major points made in these cogent analyses.

However, we also note that *Trevino* presents significant internal inconsistencies that undercut the wisdom of its newly-minted legal tests. For example, the Fifth Circuit panel states:

"It is not for the court to undertake to evaluate the quality of the government's review. The only factual question is whether the government actually exercised design discretion. If the government intended to exercise its discretion over the design of a product and a government official undertakes to substantially review, evaluate, and then approve the design, the first element of the *Boyle* test is satisfied *even if the government official doing the review was incompetent or negligent.*" *Trevino*, 865 F.2d at 1486-1487 n. 12 [emphasis supplied]

Yet, in the very next breath the panel says that "the government's use of clearly unqualified individuals to review and approve highly technical design work" may nevertheless be

"evidence that the government does not intend to exercise design discretion but is merely rubber-stamping the contractor's design specifications. That seems to be the case here." *Id.* at 1487 n. 12.

The court cannot have it both ways. It cannot pay lip service to a rule against questioning the competence, qualifications or negligence of a government review officer but nevertheless authorize scrutiny of those very same qualifications, competence and knowledge under the rubric of purported "evidence." Such a "rule" is not rule at all. It sends conflicting signals to the trial bench and bar and authorizes, instead, "witch hunt" investigations into the mental prowess of federal officials.

Moreover, there should be no illusions about the real world impracticalities of such an approach. There is simply no way of determining whether the military fully considered the alternative designs and permutations thereof without analyzing the way military decisions are made and probing the values which the military ascribes to each of the risk-utility factors involved in design decisions. Under *Trevino* it will be to plaintiff's advantage in each case to question the level of the military's relevant "knowledge and expertise" or the qualifications and competence of federal "approvers." Thus, plaintiff's lawyers will question both the competence and the value structure of military decision-making in order to establish that *in fact the military made no decision, or exercised no "discretion,"* as *Trevino* puts it.

On the other hand, defendant contractors, in attempting to show that the military did in fact knowingly reject a whole host of design alternatives, will argue that the military had already made a set of *a priori* decisions to live with a given level of risk than to better the performance of the equipment. Contractors will necessarily have to examine the values behind military decision-making in order to demonstrate that the military did,

in fact, *decide to disregard alternative designs or did exercise "discretion,"* as *Trevino* puts it. In practical terms, of course, all this would potentially require extensive pretrial discovery of government employees, managers and innumerable documents upon subjects of possible sensitivity or national security. The result would be involvement of key government officials in private litigation, despite immunity from liability, thereby diverting officials from security tasks on pending and future military projects. Were such discovery unavailable, the unfairness to the contractor is manifest.

The consequences of such hair-splitting inquiries and discovery problems in a given case should be well-understood. The fault of the military, even if substantial, will play no role in the case. The desire of the military to short-circuit the design development process will be of no moment. The defendant contractor will bear the full brunt of liability. The government, being immune from suit, will bear no percentage of the harm. The doctrine of joint and several tort liability, which still governs in the large majority of jurisdictions, will impose the full cost of the injury upon the government contractor. The Second Circuit, in its ringing endorsement of the government contractor defense before *Boyle*, took careful note of the harsh impact of judgments in military contractor cases:

"[T]he government cannot be sued and need not even cooperate with the contractor in defending personal injury litigation. Obtaining discovery from the government as a non-party might be difficult or even barred by a claim of national security privilege. The military contractor thus faces the great exposure of being the sole deep pocket available." *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 187, 191 (2d Cir. 1987), cert. denied sub nom. *Lombardi v. Dow Chemical Co.*, 108 S. Ct. 2898 (1988).

Furthermore, questions about the experience, knowledge, training or qualifications of military officials reviewing designs will not be merely an isolated, remote possibility. After all,

contractors are often chosen *because* their level of expertise on the particular subject far surpasses that of the military. *Trevino*, however, strongly suggests that the government's establishment of "minimal or general standards" followed by "approval" of the emergent design is not sufficient [865 F.2d at 1480] and that the reviewing official must "understand the specifications" [865 F.2d at 1481] and that the "government's cognizance of the relevant design features *must be on a par with* that of the government contractor" [865 F.2d at 1481 n. 7 [emphasis supplied]]. These *Trevino* formulations must require interrogating counsel's inquiry into the "expertise," "knowledge," "understanding," "cognizance" and "qualifications" of government review officers. Nothing in *Boyle* sanctions such an open-ended litigation scheme. On the contrary, *Trevino* is thus at odds with the realities of the government's frequent desire to actually select contractors *with superior expertise* in order to overcome the government's void of knowledge.

The capabilities of a bidding contractor for technological innovation and conceptual creativity are factors that must enter into the contractor selection process. For products with which the military has long-term experience, less weight may be placed on these factors, with greater weight placed on such factors as past performance and timeliness of delivery. In products which require greater technical innovation, the military may opt for a contractor with better research and development capabilities or with proven experience or skill in the field. Sometimes, "time is of the essence," as it was in *Trevino*, so superior knowledge by the contractor is a premium need. These choices of relative contractor strengths are highly political in nature and go to the very heart of military discretion. Yet, by inviting attacks on government "approvals" which arguably fall short of some *post-hoc*, hindsight judicial standard of requisite government "knowledge" or "understanding" of "critical" design features, *Trevino* actually penalizes the "expert" manufacturer for possessing superior skill. It does so by

denying the contractor the defense announced in *Boyle*. Such a bizarre result could not have been intended by this Court. If the military has an absolute right to purchase equipment from whom it sees fit and when it sees fit, then a government contractor cannot be penalized for possessing the superior expertise and knowhow that inherently makes the review official's "cognizance" *not* "on a par" with the contractor's.

Nor should the problems of the time frame dimension be underestimated. Complex military products are often used for extended periods under conditions established solely by the military. An injury may occur many years after the contractor's work was completed. Then, there is a natural "tail" between the time of injury and the time of suit. This is followed by a further delay until the time of trial. Pretrial discovery and investigations into the mental powers, competence and qualifications of design review officers may involve exquisite inquiries into levels of knowledge possessed decades earlier by persons whose assignments were totally under military control and discretion. Pretrial investigation and discovery — even if permitted by the government — surely must be burdened by military secrets, classified information (as was the case in *Trevino*), non-cooperation, lost evidence, stale leads, incomplete memories, and even death or disability of key witnesses. Such a litigation milieu hardly augurs well for advancing the search for the truth, let alone the policies behind "uniquely federal interests." In short, *Trevino* invites litigation and inquiry into essentially nonjusticiable aspects of military thought processes.

Still another example of *Trevino*'s internal inconsistencies is the court's analysis of the Navy's knowledge about the alleged defect. *Trevino* says:

"The defective aspects of the design and the dangers of the vacuum were so obvious that *the Navy must be charged with knowledge of the defect*; yet the Navy built the

diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n. 13. [emphasis supplied]

Further, the court says, "both the Navy and General Dynamics knew or should have known of the dangers . . ." and "knew that the system as designed could create a partial vacuum." *Ibid.* Moreover, "both the Navy and General Dynamics could see that the final design included no safety devices." *Ibid.*; see also *Id.* at 1488-1489.

These "findings" that the Navy *knew* the dangers and *knew* of the absence of safety devices are dramatically inconsistent with the court's earlier conclusion that the Navy did not exercise its "discretion" in "approving" the contractor's work. Obviously, if the government is held either to have known the dangers or failed to act upon what it "should have known," then any Naval design review and "approval" performance included considerations or judgments that alternative designs were unnecessary. Such decisionmaking is, by its terms, "discretionary." On the contrary, if the dangers of the vacuum "were so obvious that the Navy must be charged with knowledge of the defect" [865 F.2d at 1487 n. 13], the Navy's "approval" here cannot have been the mere "rubber stamp" the court repeatedly discusses in hypothetical "straw man" terms. See *Id.* at 1479, 1480, 1481 n. 7, 1482, 1486, 1487 n. 12. One may question the wisdom of that "approval" by hindsight but that does not contraindicate the exercise of government "discretion."

Indeed, the *Trevino* panel seems to say so directly when discussing the findings of negligence by the Navy. There the court restates the conclusion that "the Navy knew" the design dangers [865 F.2d at 1488] and even that the Navy "chose to use the GRAYBACK as designed and *dealt* with the possibility of a vacuum *by training its employees* rather than by modifying the submarine." *Id.* at 1488-1489 [emphasis supplied]. This "*method of dealing with the dangers in the design* were effective for thirteen years." *Id.* at 1489 [emphasis supplied].

If the Navy *knew* or should have known the dangers and *chose* to use the design by *dealing* with the problem through the training of personnel instead, it is obvious that some element of conscious design discretion *was*, in fact, exercised. The "approval" of a design throughout planning, construction and actual use for over 13 years could not have been a "rubber stamp." The *Trevino* findings are internally inconsistent² and should be reviewed.

2. The Fifth Circuit panel seems to grapple with this inconsistency by labeling the Navy's conduct a "rubber stamp" and by calling this a case of "failure to exercise discretion over the design." 865 F.2d at 1487 n. 13 [emphasis in original]. However, this is mere semantic distortion. If one "knew" about a design danger because it was "obvious" and "chose" to "approve" the design nonetheless and also "chose" to "deal with the problem" by training users instead, the discretionary element of "choice" is not thereby eliminated by calling it a "failure" to exercise "discretion." A decision *not* to change a *known* danger or to accept *known* and obvious risks by dealing with them in another manner is as much a "discretionary" decision as one in favor of changing the design.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Advisory Council, Inc.

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APPENDIX

Member Companies of *Amicus Curiae* Product Liability Advisory Council, Inc. ("PLAC")

American Home Products Corporation
American Telephone & Telegraph
Amoco Corporation
Anheuser-Busch Companies, Inc.
Automobile Importers of America
The Budd Company
Caterpillar, Inc.
Chrysler Corporation
Clark Material Handling Company
The Coleman Company, Inc.
Dana Corporation
Defense Research Institute
Dow Chemical Company
Eaton Corporation
Exxon Corporation
Federal-Mogul Corporation
Fiat Auto U.S.A. and Ferrari, N.A.
Firestone Tire & Rubber Company
FMC Corporation
Ford Motor Company
Fruehauf Corporation
General Electric Company
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Harnischfeger Industries
Honda North America, Inc.
Hyundai Motor America
Johnson Controls, Inc.

Kawasaki Motors Corp., USA
Eli Lilly and Company
Merck & Co., Inc.
Miller Brewing Company
Mitsubishi Motor Sales of America
Monsanto Company
Motor Vehicle Manufacturers Association of the United States, Inc.
Navistar International Transportation Corp.
Nissan Motor Corporation, USA
Otis Elevator Company
Paccar, Inc.
Piper Aircraft Corporation
Playtex Family Products Corp.
Porsche Cars North America, Inc.
Procter & Gamble Company
RJR Nabisco, Inc.
Rockwell International
Saab-Scania of America, Inc.
Snap-On Tools Corporation
Squibb Corporation
Sturm, Ruger and Company
Subaru of America, Inc.
TRW, Inc.
Toyota Motor Sales, U.S.A., Ltd.
U-Haul International
Union Carbide Corporation
Unocal Corporation
U.S. Tobacco
USX Corporation
Volkswagen of America, Inc.
Volvo North America Corporation
Jervis B. Webb Company
Yamaha Motor Corporation, U.S.A.